

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,321

RUSSELL H. STEWART,)
)
Appellant,)
)
v.)
)
UNITED STATES OF AMERICA,)
)
Appellee.)

Appeal From Judgment of The
United States District Court
For The District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

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CLERK

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STATEMENT OF QUESTION PRESENTED

The question is whether, in a trial upon an indictment for violating the federal narcotic laws, where the only issue is the defendant's sanity, it is plain error for the prosecutor to argue to the jury that following an acquittal by reason of insanity and subsequent commitment to a mental institution, defendant would be speedily released.

Summary of Argument 2

Argument 3

It Was Plain Error For the
Prosecutor to Argue that
Following an Acquittal by
Reason of Insanity and Sub-
sequent Commitment to a Mental
Institution, Defendant Would
Be Speedily Released.

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Following an Acquittal by
Reason of Insanity and Sub-
sequent Commitment to a Mental
Institution, Defendant Would
Be Speedily Released.

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SPECIFICATION OF POINT ON APPEAL

In his closing rebuttal argument the prosecutor suggested to the jury that if acquitted by reason of insanity, defendant would be speedily released from Saint Elizabeths Hospital. He thus improperly injected the future mental condition of the defendant into the jury's consideration. Moreover, he suggested that defendant's release would be dependent on recommendations to be made by doctors holding an opinion of defendant's sanity similar to that of the government's expert witness. Finally, he misled the jury by stating that defendant's expert witness would have nothing to do with any release proceeding, although in fact defendant's expert witness would be available to the Government at any future determinations of defendant's mental status.

With respect to the question presented, appellant desires the Court to read the following pages of the reporter's transcript: Tr 59-60, 196, 200-201, 205-207.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,321

RUSSELL H. STEWART,)
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 Appellant,)
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 v.)
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UNITED STATES OF AMERICA,)
)
 Appellee.)

Appeal From Judgment of The
United States District Court
For the District of Columbia

JURISDICTIONAL STATEMENT

Russell H. Stewart, the appellant, was tried and convicted in the United States District Court for the District of Columbia on a two count indictment charging him with having possessed narcotics in violation of 26 U.S.C., § 4704 (a), and with having facilitated the concealment and sale of

narcotics in violation of 21 U.S.C., § 174. The District Court had jurisdiction to try appellant for such offenses. 18 U.S.C., § 3231. Judgment of conviction was entered on December 13, 1963. Appellant's motion for leave to prosecute an appeal without prepayment of costs was granted on December 20, 1963. This Court has jurisdiction upon appeal to review the judgment of the District Court. 28 U.S.C., § 1291.

STATEMENT OF THE CASE

At the trial of appellant, Russell H. Stewart, the sole defense presented in his behalf was insanity. Dr. George C. Darr, a psychiatrist, testified for the defense that Stewart's possession of narcotics was a product of mental illness. (Tr 72). To rebut Dr. Darr's testimony the Government called Dr. John R. Cavanagh, also a psychiatrist, who said that the defendant was of sound mind and that his possession of narcotics was not caused by mental illness. . . . (Tr 127).

In his opening statement defendant's attorney, Charles Sures, began to inform the jury of the consequence of a verdict of not guilty by reason of insanity. But before the explanation was completed, the Assistant United States

Attorney, Harold Titus, asked to approach the bench. At the bench conference which followed, the Court sustained the Government's objection to the explanation begun by defendant's attorney on the ground that it was not proper during opening statement. The Court, however, seemingly acquiesced in the defense attorney's statement that the jury could be told in final argument of the result of a not guilty by reason of insanity verdict. (Tr 59-60).

In his final argument Mr. Sures informed the jury that if the defendant was found not guilty by reason of insanity, he would not be released, but he would be confined to a mental institution, possibly for the rest of his life. He further explained that defendant's final release from a mental institution would be permitted only with the Court's permission, and then only after a hearing at which physicians such as Dr. Darr testified that defendant would be safe to society and to himself. (Tr 196, 200-201, 205).

In response to these comments by defendant's attorney, the prosecutor, Mr. Titus, replied as follows:

Now, perhaps I have been given an opportunity to really express myself with regard to this argument, because I think it needs some expressing.

I am glad counsel made his point emphatically because now I can, which I could not do before, make them just as emphatically.

Did it ever seem strange to you that a defendant who sits before you at trial in a criminal case such as this one is asking you to put him away for life, maybe?

That is what the lawyer has argued. He said, "Don't you know that this defendant could be found not guilty by reason of insanity and go to a hospital and remain there for perhaps the rest of his life, and I would want him to be there for perhaps the rest of his life?"

Who is kidding whom?

This defendant, who will not talk to the doctor, is asking you to put him away, if I may use the expression that was used--for life.

Now, ladies and gentlemen of the jury, let's get one thing basically clear. Yes, a verdict of not guilty by reason of insanity means, as the court will tell you, that a defendant will be committed to a hospital until such time as he is recommended for a release, and he then comes before, not a Commission, as counsel said, but before the Court, to reach a determination as to whether that man will be a danger to himself or to others in the reasonably foreseeable future, and counsel has said to you that that decision to make that recommendation will be made by doctors at St. Elizabeths Hospital, such as Dr. Darr.

Make no mistake about it, it will not be Dr. Darr. Dr. Darr makes no such recommendations. He is merely a consultant for psycho-therapy.

Now, those recommendations may be made by men like Dr. Kavanaugh, and if they were, you figure out what the end result would be in time. Just start figuring.

Do you think this defendant is not aware of that? Don't kid yourselves. (Tr 206-07).

Neither Mr. Titus nor Mr. Sures objected to the other's comments made in final argument.

At the close of the trial, the Court instructed the jury that "if you find that the defendant is not guilty by reason of insanity, the accused will be confined in a hospital for the mentally ill until the superintendent of the hospital has certified and the Court is satisfied that such person has recovered his sanity and will not in the reasonably foreseeable future be dangerous to himself or to others, in which event and at which time the Court shall order his release, either unconditionally or in the event he has not recovered his sanity, under such conditions as the Court may see fit." (Tr 241).

The jury found the defendant guilty on both counts of the indictment. On December 13, 1963, he was sentenced to ten years on each count, the sentences to run concurrently.

STATUTE AND RULE INVOLVED

D.C. Code § 24-301 (d):

If any person tried upon an indictment or information for an offense, or tried in the juvenile court of the District of Columbia for an offense, is acquitted solely on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill.

D.C. Code § 24-301 (e):

Where any person has been confined in a hospital for the mentally ill pursuant to subsection (d) of this section, and the superintendent of such hospital certifies (1) that such person has recovered his sanity, (2) that, in the opinion of the superintendent, such person will not in the reasonable future be dangerous to himself or others, and (3) in the opinion of the superintendent, the person is entitled to his unconditional release from the hospital, and such certificate is filed with the clerk of the court in which the person was tried, and a copy thereof served on the United States Attorney or the Corporation Counsel of the District of Columbia, whichever office prosecuted the accused, such certificate shall be sufficient to authorize the court to order the unconditional release of the person so confined from further hospitalization at the expiration of fifteen days from the time said certificate was filed and served as above; but the

court in its discretion may, or upon objection of the United States or the District of Columbia shall, after due notice, hold a hearing at which evidence as to the mental condition of the person so confined may be submitted, including the testimony of one or more psychiatrists from said hospital. The court shall weigh the evidence and, if the court finds that such person has recovered his sanity and will not in the reasonable future be dangerous to himself or others, the court shall order such person unconditionally released from further confinement in said hospital. If the court does not so find, the court shall order such person returned to said hospital....

F. R. Cr. P. 52(b):

PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SUMMARY OF ARGUMENT

In his closing rebuttal argument the prosecutor suggested to the jury that if acquitted by reason of insanity, defendant would be speedily released from Saint Elizabeths Hospital. He thus improperly injected the future mental condition of the defendant into the jury's consideration. Moreover, he suggested that defendant's release would be dependent on recommendations to be made by doctors holding an opinion of defendant's sanity similar to that of the government's expert witness. Finally, he misled the jury by stating that defendant's expert witness would have nothing to do with any release proceeding, although in fact defendant's expert witness would be available to the Government at any future determinations of defendant's mental status.

ARGUMENT

It Was Plain Error For the Prosecutor to Argue That Following an Acquittal by Reason of Insanity and Subsequent Commitment to a Mental Institution, Defendant Would be Speedily Released.

Defendant was denied a fair trial as a result of the closing rebuttal argument of the Assistant United States

Attorney, Harold Titus. The only real issue in the case was the sanity of the defendant, Russell Stewart, at the time of the alleged crime. Mr. Titus emphatically suggested to the jury (Tr 206-07) that the defendant would be speedily released from Saint Elizabeths Hospital despite a jury finding of acquittal by reason of insanity. Such a suggestion, in effect, presented for the jury's consideration the future mental condition of the defendant. This Court has ruled, however, that the future mental condition of the defendant may not properly be considered by the jury:

"As of the time of proposed or potential release from commitment the question is whether the accused has regained his sanity and whether he will in the reasonable future be dangerous to himself or others. That determination is confided by the statute [footnote omitted] in the superintendent of the hospital and the court....

The jury upon the trial has no concern with the mental state of the accused at some future time, or with what the superintendent of the hospital may some day certify, or with what the Court may thereafter find."

Lyles v. United States, 103 U.S. App. D.C. 22, 27, 254 F.2d 725, 730 (1958).

Mr. Titus suggested that recommendation for the release of defendant would be made by men like Dr. Cavanagh, the government's expert witness, who had stated during the trial that he did not believe defendant was suffering from a mental disease or defect. He wanted the jury to consider that if Dr. Cavanagh could make the recommendation, the defendant would be speedily released. He misleadingly suggested that the position of Saint Elizabeths Hospital would be that of Dr. Cavanagh. There was no evidence to warrant such a suggestion. Moreover, the statute strictly confines the power to recommend release solely in the superintendent of the mental institution to which the defendant is sent. D.C. Code § 24-301(e) (1961). Furthermore, Mr. Titus suggested that the defendant's expert, Dr. Darr, who believed the defendant insane at the time of the crime, would have nothing to do with any future determinations of defendant's mental status. Clearly this was also misleading; Dr. Darr would be available to testify for the Government at a future hearing as to defendant's mental condition in accordance with D.C. Code § 24-301 (e) (1961). The net effect of Mr. Titus' argument was to leave the jury with the feeling that if they found the defendant

not guilty by reason of insanity there soon would be a subsequent determination of defendant's sanity at which time the view of the government's expert would prevail and defendant would be released.

Apparently, Mr. Titus had doubts regarding the propriety of his argument. That is why he endeavored to rest the justification of his comments on the argument made by Charles Sures, defendant's counsel. (Tr 206). However, it may be fairly stated that the comments of Mr. Sures regarding the commitment of the defendant to a mental institution upon a finding of not guilty by reason of insanity did not justify Mr. Titus' suggestions that defendant would not be kept in a mental institution very long.

Mr. Sures endeavored to comment on the legal effect of a verdict of not guilty by reason of insanity. (Tr 196). In Taylor v. United States, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (1955), this Court approved of counsel informing the jury that if defendant "is acquitted by reason of insanity he will be presumed to be insane and may be confined in a 'hospital for the insane as long as the public safety and * * * [his] welfare' require." [footnotes omitted].

The purpose of D.C. Code § 24-301(d) which requires that a defendant found not guilty by reason of insanity be sent to a mental institution is to protect the public and discourage unfounded pleas of insanity. In re Milton T. Rosenfield, 157 F. Supp. 18 (D.C. Cir. 1958); reversed and remanded on other grounds, 262 F.2d 34, 104 U.S. App. D.C. 322 (1958). Mr. Sures exercised his prerogative of stating the consequences of an acquittal by reason of insanity.

Mr. Titus went well beyond the legal result of an acquittal by reason of insanity. He endeavored to present his witness' opinion as bearing on the factual probability of defendant's release at a future date.

This Court has recognized that "plain error affecting substantial rights" [F. R. Crim. P. 52(b)] may result from prejudicial comment made by the prosecutor in his closing argument. Stewart v. United States, 101 U.S. App. D.C. 51, 247 F.2d 42 (1957); Evans v. United States, 98 U.S. App. D.C. 122, 232 F.2d 379 (1956). Appellant urges that the prosecutor's remarks alluded to hereinabove constituted plain error affecting substantial rights and should be noticed although they were not brought to the attention of the Court.

The purpose of this study is to determine the effect of the use of the word "and" in the title of a research paper on the number of citations it receives. The study was conducted using a sample of 100 research papers from the field of psychology. The papers were divided into two groups: one group with the word "and" in the title and one group without. The number of citations for each paper was counted. The results showed that papers with the word "and" in the title received significantly more citations than papers without. This suggests that the use of the word "and" in the title of a research paper may be a useful strategy to increase the number of citations it receives.

CONCLUSION

Wherefore, it is respectfully submitted, the judgment of the District Court should be reversed and the case remanded for a new trial.

Respectfully submitted,

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(Appointed by this Court)

BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,321

RUSSELL H. STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
HAROLD H. TITUS, JR.,
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Assistant United States Attorneys.

United States Court of Appeals

for the District of Columbia Circuit

FILED APR 17 1964

Nathan J. Paulson
CLERK

QUESTION PRESENTED

Charged with narcotics violations, appellant's sole defense was insanity. The jury was properly advised that the issue to be determined was the accused's mental condition *at the time the offense was committed*. In addition, the consequence of an acquittal by reason of insanity was fully explained. In the opinion of the appellee, the following question is presented:

Where an acquittal by reason of insanity was urged by appellant on the ground that such a verdict might result in his permanent commitment to a mental institution, and where that argument was repeatedly emphasized by defense counsel as the primary justification for acquittal, is it reversible error for Government counsel to have answered, *without objection from the defendant*, that permanent commitment is not a necessary consequence of an insanity acquittal?

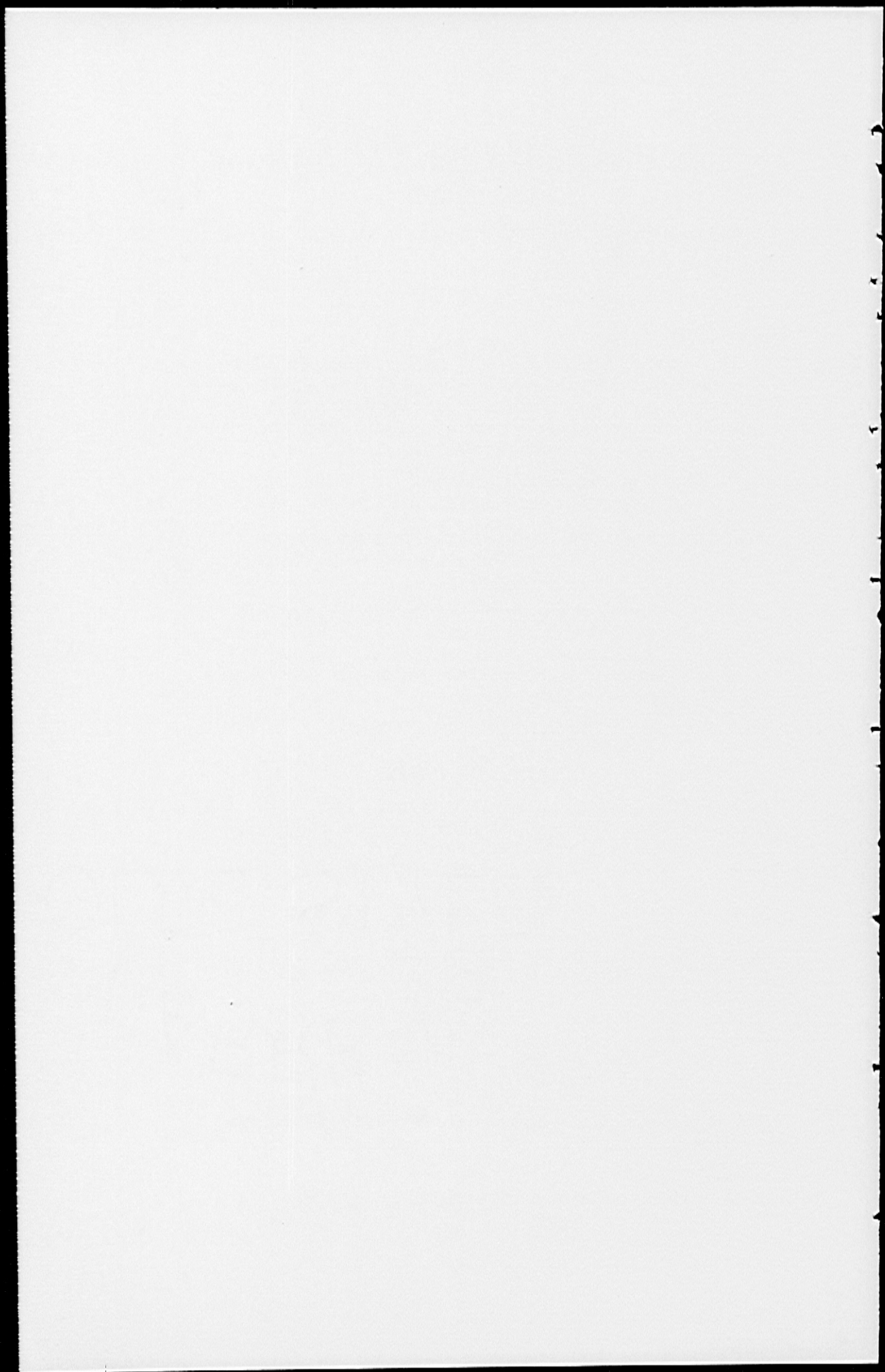
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* Cases chiefly relied upon are marked by asterisks.



United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,321

RUSSELL H. STEWART, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

In a two-count indictment filed on July 30, 1962, appellant was charged with narcotics violations. 21 U.S.C. § 174; 26 U.S.C. § 4704(a). Following a mistrial, appellant's second trial commenced on November 7, 1963. The jury returned a verdict of guilty as charged. On December 13, 1963, appellant was sentenced to serve ten years imprisonment on each count of the indictment, the sentences to run concurrently.

On June 27, 1962, appellant was arrested with ninety-nine capsules of heroin hydrochloride in his possession.

(Tr. 25-29). At trial, his sole defense to the offenses arising out of that situation was insanity. (Tr. 56-57). In support of that defense, appellant called Dr. George C. Darr, a psychiatrist. Dr. Darr testified that appellant was afflicted with two mental disorders—drug addiction and inadequate personality. (Tr. 65-66). In answer to questions propounded by defense counsel, Dr. Darr also stated that appellant “would go back on drugs” if released. (Tr. 75). The Government’s response to Dr. Darr’s opinion was provided by Dr. John R. Cavanagh who testified that appellant demonstrated no symptoms of “any classifiable mental illness.” (Tr. 128).

At the conclusion of the evidence, defense counsel argued and the Government replied as follows:

Defense Argument

The verdict that we ask is a verdict of not guilty by reason of insanity. Now we ask that verdict because there is not any such verdict as guilty by reason of insanity.

I personally believe, if there were such a thing, it would be perfect for a case of this nature; he would be found guilty and would go to a mental hospital and would stay there until he was cured.

That is the point that I am now raising. That if you find him not guilty by reason of insanity, he will not be released, he will go to a mental institution such as St. Elizabeth’s and probably St. Elizabeth’s for the rest of his life if necessary, until any physicians such as Dr. Darr and those like him at those hospitals testify at a Commission hearing that this man is safe for himself, is safe towards society, and will not in the foreseeable future

Government Rebuttal

Now, ladies and gentlemen of the jury, let’s get one thing basically clear. Yes, a verdict of not guilty by reason of insanity means, as the court will tell you, that a defendant will be committed to a hospital until such time as he is recommended for a release, and he then comes before, not a Commission, as counsel said, but before the Court, to reach a determination as to whether that man will be a danger to himself or to others in the

Defense Argument (Cont.)

do harm to himself or to anyone else.

They must so testify. In addition, at a Commission at the hospital, and the Superintendent of the Hospital must so testify before this Court and it is only with the Court's approval that he would then be released.

Now his honor will be more explicit about that for you. But that is the general result—that is the result, as a matter of fact, of a verdict of not guilty by reason of insanity. (Tr. 195-97).

* * * *

Putting a man in jail today for possession of narcotics is not going to stop him.

Take Stewart and in putting him in jail, it will not stop him from possessing narcotics when he gets out. Dr. Darr testified he does not know how long it is going to be, but the day he is out, back he goes, back into it.

Well, one might be tempted to say at that point that is his headache. Well, if it were only his headache, I do not think I would care so much. But, I suggest to you that it is everybody's headache. When he goes after narcotics again, assuming that he is just put in jail and released after a certain period of time, there are ways of getting it, it encourages the rackets itself, and he has to get money to get it, and I think we are all very well familiar with how these people get money to get narcotics because, if they are addicted, they are not fit subjects for proper work; and, if they are not fit subjects for proper work, they have no way of getting money except illegally, and someone is going to suffer.

Government Rebuttal (Cont.)

reasonable foreseeable future, and counsel has said to you that that decision to make that recommendation will be made by doctors at St. Elizabeth's hospital, such as Dr. Darr.

Make no mistake about it, it will not be Dr. Darr. Dr. Darr makes no such recommendations. He is merely a consultant for psycho-therapy.

Now, those recommendations may be made by men like Dr. Kavanaugh, and if they were, you figure out what the end result would be in time. Just start figuring.

Do you think this defendant is not aware of that? Don't kid yourselves. (Tr. 206-07).

I say the only logical way, regardless, if you just set aside all of the medical testimony, what I am asking for this man and what he is risking for himself right now by letting me ask it, is a worse sentence than finding him guilty because he can stay in that institution for the rest of his life, and I hope he does if he is not cured, because I do not want him walking the streets unless he is cured. (Tr. 199-201).

* * * *

I believe that the consequences of your verdict are as important as how you arrive at it. (Tr. 204).

On the basis of just plain pure logic, survival for the community that we live in, if you wish to look at it in that way, putting Stewart in a mental institution permanently if necessary, with the safeguards of a medical Commission and a court, before he could ever be released is the sensible, civilized manner to proceed in a case of this nature. (Tr. 205).

Did it ever seem strange to you that a defendant who sits before you on trial in a criminal case such as this one is asking you to put him away for life, maybe?

That is what the lawyer has argued. He said, "Don't you know that this defendant could be found not guilty by reason of insanity and go to a hospital and remain there for the rest of his life, and I would want him to be there for perhaps the rest of his life?"

Who is kidding whom?

This defendant, who will not talk to the doctor, is asking you to put him away, if I may use the expression that was used—for life. (Tr. 206).

STATUTES INVOLVED

Title 21 U.S.C. § 174 provides:

Same: penalty: evidence.—Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or sub-

sequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, § 105, 70 Stat. 570.)

Title 26 U.S.C. §4704(a)—General requirement provides:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

SUMMARY OF ARGUMENT

Appellant unsuccessfully asserted the defense of insanity to charges of violations of the narcotics laws. At trial, his attorney argued to the jury that acquittal by reason of insanity was the only appropriate verdict since it would result in the defendant's commitment to a mental hospital—a commitment which might be permanent. Government counsel replied by suggesting that permanent commitment was not a necessary result of acquittal. The answer was logically responsive to and prompted by the defense argument. No objection was made to the prosecutor's reply at the time of trial. The jury was repeatedly instructed that it was to be concerned solely with the defendant's mental condition at the time the offenses were

committed, and properly advised regarding the consequence of an acquittal by reason of insanity. In these circumstances the prosecutor's responsive, accurate and provoked comments regarding the effect of an insanity acquittal provide no basis for reversal.

ARGUMENT

Having argued for acquittal by reason of insanity on the ground that such a verdict might result in life-long committment to a mental institution, appellant cannot now attack the prosecutor's unchallenged, accurate and responsive reply to that argument.

(See Tr. 195-207, 230-240).

Found in possession of ninety-nine capsules of heroin hydrochloride, appellant was charged, tried and convicted of narcotics violations. He now demands reversal of his conviction on the sole ground that the prosecutor commented upon the possible effect of a verdict of not guilty by reason of insanity in closing argument. The circumstances in which the comments were made suggest three compelling reasons for rejection of appellant's demand for reversal.

A. The prosecutor's argument was an appropriate response to comments made by defense counsel.

Appellant's sole defense was insanity. Reliance upon that defense puts in issue the defendant's mental condition at the time the offense charged was committed; his future mental condition is wholly irrelevant to the issues raised. *Lyles v. United States*, 103 U.S. App. D.C. 22, 254 F.2d 725 (1957), *cert. denied*, 356 U.S. 961 (1958). Despite that rule, defense counsel intentionally elicited testimony that appellant's alleged disorder would cause him to commit narcotics violations in the future. (Tr. 75). He then argued to the jury repeatedly that the only solution to appellant's problem was to place him "in a mental institution permanently if necessary." (Tr. 205,

196-201). When Government counsel suggested that it might "seem strange" for a defendant to request permanent commitment and that permanent commitment was not appellant's objective, his answer was a natural response to the argument it was designed to rebut. (Tr. 206).

Other comments now challenged were equally responsive to defense argument. Defense counsel asserted that appellant would not be released until men like Dr. Darr, the psychiatrist who testified in appellant's behalf, would testify that appellant "will not in the reasonable future do harm to himself or to anyone else," and that "they must so testify" before appellant could be released. (Tr. 196). Government counsel answered that Dr. Darr's recommendation was not essential to appellant's release, and that recommendation for release "may be made by men like Dr. Kavanaugh," (*sic*) the psychiatrist called by the Government. (Tr. 207). It was not suggested, as appellant now contends, that Dr. Darr would not be available to testify for the Government at a future hearing, or that the position of Saint Elizabeths Hospital would be identical to that of Dr. Cavanagh.

The prosecutor's entire argument regarding appellant's future release was affirmatively invited by the defense approach. As was recently stated by a New York court confronted with an identical situation, "[T]he District Attorney had the right to answer the suggestion made by defense counsel that the jury could prevent defendant's returning to society during his life by finding him insane by pointing out that such a finding by the jury could bring no such assurance." *People v. Reade*, 1 N.Y. 2d 459, 461, 154 N.Y.S. 2d 27, 29 (1956). As a logical response to defense argument, the prosecutor's rebuttal provides no basis for reversal of appellant's conviction. See *Lawn v. United States*, 355 U.S. 339, 360 (1958) (prosecutor's assertion of belief in truth of witness' testimony held proper retaliation to defense attack); *Homan v. United States*, 279 F. 2d 767 (8th Cir.), *cert. denied*, 364 U.S.

866 (1960) (prosecutor's statement that defense counsel "knows his client is guilty" approved where "prompted and not unnatural"); *Gridley v. United States*, 44 F.2d 716 (6th Cir.), *cert. denied*, 283 U.S. 827 (1930).

This Court has recognized that while the fact of automatic commitment following an acquittal by reason of insanity "has no theoretical bearing on the jury's verdict it may have a practical bearing." *Taylor v. United States*, 95 U.S. App. D.C. 373, 379, 222 F.2d 398, 404 (1955). Apparently defense counsel was equally aware of the "practical bearing" of the fact of future commitment. He chose to rest his entire argument on that fact. (Tr. 196-201, 205). Acceptance of appellant's current suggestion that the Government was obliged to remain silent in the face of that argument would be neither logical nor fair. Exclusion of evidence or argument regarding an accused's future mental condition is a right conferred upon every defendant. "But in the present state of the law there is no barrier to a waiver of the benefit thus bestowed upon him especially where it is a calculated maneuver." *Lyles v. United States*, *supra*, 103 U.S. App. D.C. at 29, 254 F.2d at 732. Having argued the possible consequence of an acquittal by reason of insanity and having remained silent to the prosecutor's responsive reply to that argument, appellant, by acquiescence and affirmative act, has waived any objections to the prosecutor's argument which might otherwise have been available.

B. Appellant's failure to object to the prosecutor's argument precludes consideration of his objection on appeal.

At trial, appellant did not voice a whisper of opposition to the remarks he now so vigorously attacks. That fact alone dictates the appropriate disposition of appellant's demand for reversal. A defendant cannot "remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial."

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 239 (1940). The circumstances of this case suggest no justification for ignoring appellant's silence at trial.

The reply of Government counsel to the expression of defense counsel was prompted and responsive. On this apparently equal exchange, it is unlikely that one expression would have had any greater force with the jury than the other. "In fact, one would have to be naive to think that the jury would in the situation accord any effect to either." *Homan v. United States*, *supra*, 279 F.2d at 776. Plainly, the prosecutor's responsive argument was not "so offensive as to deprive the defendant of a fair trial". *Isaacs v. United States*, 301 F.2d 706, 736 (8th Cir.), *cert. denied*, 371 U.S. 818 (1962). Falling short of that effect, it provides no basis for reversal.

C. *The trial court's proper instructions regarding the issues raised by the defense of insanity and the consequences of acceptance of the defense removed any confusion which may have been engendered by argument.*

Appellant's attack upon the prosecutor's argument is based on the contention that it "improperly injected the future mental condition of the defendant into the jury's consideration." (Br. 9). Any such effect was plainly nullified by the court's repeated admonition that "the crucial time involved, so far as mental responsibility is concerned," was June 27, 1962—the date the offense was committed. (Tr. 230, 235, 240). In addition, the court properly charged that an acquittal by reason of insanity would result in commitment of the defendant to a mental hospital "until the superintendent of the hospital has certified and the Court is satisfied that such person has recovered his sanity and will not in the reasonably foreseeable future be dangerous to himself or to others." (Tr. 241). Assuming, *arguendo*, that the prosecutor's argument was inappropriate in the circumstances, the impropriety was rendered harmless by the court's instructions.

Cf., State v. McDonald, 184 S.C. 290, 192 S.E. 365 (1937); *Mott v. State*, 95 Okla, Crim. 145, 232 P.2d 166 (1951). This Court may "fairly proceed on the basis that the jury followed these instructions," *Delli Paoli v. United States*, 352 U.S. 232, 241 (1957), and ignored irrelevant factors which may have been mentioned by counsel.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

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